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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM BROCKHAUS, Plaintiff, -v- LUIS MIGUEL GALLEGO BASTERI a/k/a LUIS MIGUEL, Defendant.	:	15-cv-2707 (KBF) MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Before the Court is plaintiff's application for attorney's fees and costs. There is no dispute that under the terms of the personal services contract ("Contract") between plaintiff and defendant, plaintiff is entitled to an award of attorney's fees. (PX 1 ¶ 13(c).) The dispute is over how much.

Because defendant chose to litigate this action rather than pay plaintiff under the Contract, defendant bears the reasonable costs of litigation. However, because plaintiff's quantum meruit claim is not a contract claim, the proposed award must be reduced accordingly. In this case, after considering all the factors regarding the reasonableness of the award, the Court awards plaintiff $359,628.50 in attorney's fees and $35,389.71 in costs.

I. BACKGROUND

The facts underlying this action are now familiar to all. The Court only recites those relevant to the instant motion.

Plaintiff filed this action on September 22, 2014 in state court in El Paso, Texas, where he lived and performed services as personal manager to defendant. (ECF No. 1, Ex. A.) Defendant removed the action on grounds of diversity jurisdiction to the U.S. District Court for the Western District of Texas, and then moved to transfer the action to the Southern District of New York pursuant to the forum selection clause in the Contract. (ECF No. 1, 24, 25.) Plaintiff was represented by ScottHulse, a Texas law firm, for the period of time when the action was pending in Texas courts. (ECF No. 1.) After the action was transferred to this district, plaintiff was represented by Epstein, Becker and Green (EBG). (ECF Nos. 27, 28.)

After conducting discovery—including a discovery dispute relating to defendant Mr. Miguel's refusal to appear for his deposition in New York—and briefing on a motion to dismiss and motions in limine, this action proceeded to a bench trial on December 16, 2015. During the trial, it was revealed that the methodology that defendant's accountant used to calculate commissions for plaintiff had been incorrect under the Contract. The correct method resulted in a far smaller figure of recovery for plaintiff under the Contract.

In an Opinion and Order dated May 19, 2016, this Court found in favor of plaintiff on his breach of contract claim; specifically, the Court found that the personal services contract ("Contract") between plaintiff and defendant was effective between July 1, 2012 and June 30, 2014 and that defendant owed plaintiff commissions under the Contract of $549,776.85. (May 19, 2016 Op., ECF No. 96.)

However, the Court found against plaintiff on his quantum meruit claim for services rendered prior to the beginning of the Contract on July 1, 2012. (Id.)

Plaintiff filed the instant application for attorney's fees and costs under the Contract, seeking an award of $379,628.50 in attorney's fees and $35,389.71 in costs. (ECF No. 101.) The motion became fully briefed on June 24, 2016. (ECF Nos. 104, 105.)

II. LEGAL STANDARDS

The Contract provides that "[i]n the event that any action, suit, or proceeding arising from or based upon this agreement is brought by either party hereto against the other, the prevailing party shall be entitled to recover from the other his reasonable attorney's fees in connection therewith in addition to the costs of such action, suit, or proceeding." (PX 1 ¶ 13(c).) A "prevailing party" for the purposes of attorney's fees is a party that "succeed[s] on any significant issues in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); see also Farrar v. Hobby, 506 U.S. 103, 111 (1992) ("Therefore, to qualify as a prevailing party, a . . . plaintiff must obtain at least some relief on the merits of his claim.") Plaintiffs are also entitled to "reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients." LeBlanc–Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998).

In the Second Circuit, attorney's fees are calculated based on the "presumptively reasonable fee" approach adopted in Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections, 522 F.3d 182, 190 & n. 4 (2d Cir. 2008). The approach prescribes that a court consider "all of the case-specific variables in setting a reasonable hourly rate"—i.e., "the rate a paying client would be willing to pay"—and multiply that amount by the number of hours reasonably expended. Arbor Hill, 522 F.3d at 190. The district court should also review, inter alia, the twelve factors set forth by the Fifth Circuit in Johnson v. Ga. Highway Express, 488 F.2d 714 (5th Cir. 1974), abrogated on other grounds by Blanchard v. Bergeron, 489 U.S. 87 (1989). Arbor Hill, 522 F.3d at 190. The Johnson factors, as summarized in Arbor Hill, are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Arbor Hill, 522 F.3d 187, n.3.

In setting a presumptively reasonable fee, the most important factor is "the degree of plaintiff's overall success." Farrar, 506 U.S. at 114 (quoting Hensley, 461 U.S. at 436). If a plaintiff "has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonably hourly rate may be an excessive amount." Hensley, 461 U.S. at 436. The district court's ability to reduce fees because of a plaintiff's limited success is "not restricted either to cases of multiple discrete theories or to cases in which the plaintiff won only a nominal or technical victory." Kassim v. City of Schenectady, 415 F.3d 246, 256 (2d Cir. 2005).

The fee and costs applicant is the one who "bears the burden of documenting the hours reasonably spent by counsel, and the reasonableness of the hourly rates claimed." Guo v. Tommy's Sushi, Inc., 14 Civ. 3964 (PAE), 2016 WL 452319 at *3 (S.D.N.Y. 2016) (internal citations omitted). Where there is surplusage, or to account for limited success, this Court "has discretion simply to deduct a reasonable percentage of the number of hours" instead of pursuing mathematical precision. Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 173 (2d Cir. 1998) (internal quotation marks omitted); see also Hensley, 461 U.S. at 436-37 (holding that the district court "may simply reduce the award to account for the limited success").

III. DISCUSSION

The Court begins by noting that defendant knew that by not paying plaintiff, he would be incurring litigation costs because the Contract expressly provided for fee shifting. Litigation itself is unpredictable; the amount of time it takes to litigate is unpredictable and the various maneuvers each side may make are unknown. Defendant bore the risk of increasing costs when he chose to fully litigate all claims instead of paying plaintiff.

The Court has reviewed the Johnson/ Arbor Hill factors and the circumstances of this particular case, including plaintiff's counsels' billing records. In particular, the Court notes that factors that weigh in plaintiff's favor include the complexity of the case, the level of skill required, counsel's performance on the briefs and at trial, the experience of counsel, and the results obtained. Arbor Hill, 522 F.3d at 187, n.3. The Court also finds that the billing records provided by both firms representing plaintiff were detailed and did not contain excessive charges. Based on the above, plaintiff has met his burden of demonstrating the reasonableness of his fees and costs. The Court determines that with the exception of the issues addressed below, the award sought by plaintiff is therefore reasonable.

Defendant asserts that the proposed award should be reduced because plaintiff did not prevail on his quantum meruit claim and because the attorney's fee entitlement stems only from the Contract. The Court agrees that the fee should be reduced because the quantum meruit claim is separate from the Contract.[1] Vortt Expl. Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex. 1990) ("Quantum meruit is an equitable remedy which does not arise out of a contract, but is independent of it.") However, many of the facts relating to quantum meruit were interrelated to those relevant to the Contract claim. Defendant urges the Court to respond by making a large reduction in the proposed fee because plaintiff "obfuscated" the amount of time spent on issues relating to each claim. The court disagrees. On the contrary, the Court finds that the overlap stems from the fact that crucial details relating to the intent, actions, and expectations of the parties

1 The Court notes that while plaintiff did not ultimately prevail on his quantum meruit claim, the argument was by no means frivolous or obviously meritless. Indeed, as the Court noted in its Opinion and Order following the trial, plaintiff ultimately could not sustain a quantum meruit claim because he failed to prove that he notified defendant that he expected to be paid for his services prior to the start date of the Contract. The resolution of this issue was only possible after evidence was presented and arguments were heard at trial. Indeed, the Court had previously denied defendant's motion to dismiss the quantum meruit claim. (ECF No. 47.)

leading up to the signing of the Contract are similar for both claims. Thus, the Court declines to make a sizable reduction based on the quantum meruit claim. Based on the Court's review of the billing records submitted by plaintiff, it determines that a reduction of $20,000 in attorney's fees is appropriate.

Defendant also argues that fees incurred by ScottHulse, the firm that initiated this action and represented plaintiff before the action was transferred to the Southern District of New York, should not be awarded because the initial pleadings were improperly filed in Texas courts. The Court recognizes that the Contract contained a clause indicating that the action should be brought in New York courts. However, plaintiff did not oppose the motion to transfer venue. In addition, ScottHulse not only initiated the case for plaintiff but also remained involved and provided some assistance with the litigation in this district spearheaded by EGB. For these reasons, the Court will not reduce the award to ScottHulse on the basis that they initially filed the case in Texas.

IV. CONCLUSION

For the reasons stated above, the Court awards plaintiff $359,628.50 in attorney's fees and $35,389.71 in costs.

SO ORDERED.

Dated: New York, New York
June 29, 2016

K. B. Forrest

KATHERINE B. FORREST
United States District Judge